Public Prosecutor v Sinniah a/l Letchumanan & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NOS 45–65 OF 2003 AND 45–48 OF 2004
NALINI PATHMANATHAN J
29 FEBRUARY 2008

Criminal Law — Penal Code (Malaysia) — ss 34, 304 — Common intention — Culpable homicide not amounting to murder — Six accused persons originally charged with murder — Plea of guilt — Mitigating factor — Gravity of offence

Criminal Procedure — Sentencing — Homicide — Offence under s 304 of the Penal Code — Plea of guilt — Mitigating factor — Gravity of offence — Appropriate sentence to be imposed — Whether public interest outweighed plea of guilt as mitigating factor

The second accused was working at a sand processing site when the victim came to see him demanding a sum of RM300. The second accused immediately called the sixth accused who upon arrival started to beat the victim together with his other friends. Thereafter the victim was tied up and beaten by all the accused until the victim's body was covered in blood. The victim eventually lost consciousness. The sixth accused examined the victim to ascertain whether he was breathing and concluded that the victim was dead. All the six accused persons then carried the victim and threw him into a river. The victim who was not in fact dead when he was thrown into the river, therefore drowned. All six accused persons in these two cases were originally charged with murder under s 302 of the Penal Code ('the Code') read together with s 34 of the Code. Subsequently the charge against all six accused persons was amended to one under s 304(b) of the Code read together with s 34 of the Code. The alternative charge was read out and explained to all the accused. The court then ascertained from each of the accused person that they understood the content of the charge and the consequences of pleading guilty to such charge. Upon plea of guilt by all the accused persons, they were convicted and pleas in mitigation were then heard. Each of the six accused plead that their plea of guilt and the fact that they were first offenders should be factors in consideration of a lower sentence. They had also expressed remorse and repentance.

Held, sentencing all the accused to nine years imprisonment from date of individual arrest:

(1) On the scale, this case fell far nearer to murder than to inadvertence because all the six accused persons saw fit to continuously severely beat the unarmed victim, each of them doing so with the common intention of brutally hurting him, possessing the knowledge that death was the likely result of the beating (see para 22).

(2) In deciding the sentence, the court is bound to give considerable weight to public interest. In this case the culpability of the six accused persons' actions and the extent of the violence and brutality that they perpetrated on the victim were the paramount factors to be considered in determining the appropriate range of sentence. The fact that the six accused persons were first offenders was a mitigating factor although the extent to which it was so was drastically limited given the nature and gravity of their offence. The courts have also recognised that it is not in every case that a discount or mitigation is entitled as of right. Where the offence is extremely grave, the courts have determined that public interest outweighs the plea of guilt as a mitigating factor, in which instance it will not be taken into account (see paras 24, 27 & 30).

(3) In the instant case, if the matter had proceeded to completion and a finding of guilt made, it is likely that the trial court would have imposed the maximum sentence available under the section, given the violence and brutality that was present. Taking into consideration the relevant factors outlined above, the appropriate sentence to be passed on each of the six accused persons in this case is a term of imprisonment of nine years which is to take effect from the dates of their individual arrest (see para 33).

[Bahasa Malaysia summary

Tertuduh kedua sedang bekerja di kawasan memproses pasir apabila mangsa datang berjumpa dengannya menuntut wang berjumlah RM300. Tertuduh kedua segera memanggil tertuduh keenam yang setibanya, mula memukul mangsa bersama-sama dengan kawan-kawannya yang lain. Kemudian, mangsa diikat dan dipukul oleh kesemua tertuduh sehingga badan mangsa berlumuran darah. Mangsa kemudiannya pengsan. Tertuduh keenam memeriksa mangsa untuk memastikan sama ada dia bernafas dan memutuskan bahawa mangsa telah mati. Keenam-enam tertuduh kemudian mengangkat mangsa dan membuang mayatnya ke dalam sungai. Mangsa yang belum mati pada masa dibuang ke dalam sungai, oleh itu lemas. Keenam-enam tertuduh di dalam dua kes ini pada asalnya dituduh membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun. Kemudian, tuduhan terhadap keenam-enam tertuduh

dipinda kepada tuduhan di bawah s 304(b) Kanun dibaca bersama dengan s 34 Kanun. Tuduhan alternatif dibacakan dan dijelaskan kepada kesemua tertuduh. Mahkamah kemudian memastikan daripada setiap seorang tertuduh bahawa mereka memahami kandungan pertuduhan dan akibat pengakuan bersalah untuk pertuduhan sedemikian. Atas pengakuan bersalah oleh kesemua tertuduh, mereka disabitkan dan rayuan pengurangan kemudiannya didengar. Setiap seorang daripada keenam-enam tertuduh merayu bahawa pengakuan salah mereka dan fakta bahawa mereka adalah pesalah kali pertama sepatutnya menjadi faktor dalam mempertimbangkan hukuman yang ringan. Mereka juga menunjukkan perasaan sesal dan insaf.

Diputuskan, menghukum kesemua tertuduh kepada hukuman penjara selama sembilan tahun dari tarikh penangkapan setiap individu:

(1) Secara imbangan, kes ini jatuh lebih hampir kepada pembunuhan daripada kelalaian kerana keenam-enam tertuduh terus-menerus memukul mangsa yang tidak bersenjata, setiap seorang berbuat demikian dengan niat bersama untuk mencederakannya secara kejam, dengan pengetahuan bahawa kematian mungkin terjadi akibat daripada pukulan-pukulan tersebut (lihat perenggan 22).

(2) Dalam memutuskan hukuman, mahkamah terikat untuk mempertimbangkan secara yang secukupnya, kepentingan awam. Di dalam kes ini kebersalahan keenam-enam tertuduh dan takat keganasan dan kekejaman yang mereka lakukan ke atas mangsa adalah faktor-faktor utama untuk dipertimbangkan dalam memutuskan jenis hukuman yang setimpal. Fakta bahawa keenam-enam tertuduh adalah pesalah pertama adalah satu faktor peringanan walaupun tahap untuknya adalah dihadkan secara drastik melihatkan sifat dan berat kesalahan mereka. Mahkamah juga menyedari bahawa bukan dalam setiap kes, diskaun atau peringanan akan diberikan terus. Jika kesalahan adalah amat berat, mahkamah telah memutuskan bahawa kepentingan awam mengatasi pengakuan bersalah sebagai faktor peringanan, di mana ia tidak akan diambil kira (lihat perenggan 24, 27 & 30).

(3) Di dalam kes ini, jika perkara tersebut telah diteruskan hingga selesai dan penemuan kesalahan dibuat, kemungkinan mahkamah perbicaraan akan mengenakan hukuman maksimum yang terdapat di bawah seksyen tersebut, melihatkan keganasan dan kekejaman yang terdapat. Mempertimbangkan faktor-faktor yang relevan yang digariskan di atas, hukuman yang setimpal yang dikenakan terhadap setiap seorang daripada keenam-enam tertuduh di dalam kes ini adalah hukuman

penjara sembilan tahun yang bermula dari tarikh penangkapan mereka secara individu (lihat perenggan 33).]

Notes

For a case on homicide, sentencing, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4254.

For cases on ss 34 and 304 of the Penal Code (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1303–1306.

Cases referred to

Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Tan Chee Seng & Ors [2004] 1 MLJ 392 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Tia Ah Leng [2000] 5 MLJ 901 (refd)
R v Cascoe [1970] 2 All ER 833 (refd)
R v Kenneth John Ball (1951) 35 Cr App R 164 (refd)
Soosainathan v PP [2001] 2 MLJ 377 (refd)

Legislation referred to

Penal Code ss 34, 34(b), 302

Wan Shaharuddin bin Wan Lamin (Deputy Public Prosecutor, Attorney-General's Chambers)
Sreekant Pillai (Sreekant Pillai & Co) for the first accused.
Suzanawati binti Ismail (Suzana Ismail & Partner) for the second accused.
KA Ramu (KA Ramu Vasanthi) for the third accused.
SS Ruban (SS Ruban & Associate) for the fourth accused.
S Bala (SBS Maniam & Associate) for the fifth accused.
Sri Saraswathy Devi (N Saraswathy Devi & Co) for the sixth accused.

Nalini Pathmanathan J:

[1] The six accused in these two cases were originally charged with the murder of one Puspanathan a/l Kumaran on 15 October 2002 under s 302 of the Penal Code ('PC') read together with s 34 of the PC. Pursuant to an application by the prosecution a joint trial was ordered and the matter was part heard prior to being transferred to this court for disposal. A total of three witnesses gave their evidence and the matter was fixed for continued hearing on 19 February 2008 when the prosecution preferred an alternative charge against all six accused.

[2] The alternative charge reads as follows in English: A

> ... That you together with three others who remain at large did on 15 October 2002 between 8.30pm and 12 midnight at the Dolomite sand processing site in Jalan Dato' Mohd Sidin, Bukit Kuda, in Klang, Selangor Darul Ehsan, with common intention did cause the death of Puspanathan a/l Kumaran by causing grievous bodily harm that caused his death and as such you have committed an offence that can be punished under s 304(b) of the Penal Code read together with s 34 of the Code. B

[3] On 19 February 2008, the alternative charge under s 304 limb (b) read together with s 34 of the PC as read out and explained to the six accused in the Tamil language. The court also advised the six accused of the consequences of pleading guilty to the said offence. All six accused, who were represented by counsel, pleaded guilty. The matter was then adjourned for further hearing to 22 February 2008. C D

[4] On that date, the alternative charge was again read to all six accused in Tamil and explained to them. The court then ascertained from each of the accused persons that they understood the content of the charge and the consequences of pleading guilty to such charge, namely that they were each liable to a punishment of up to ten years' imprisonment, or a fine or both. Again each of the six accused persons unhesitatingly pleaded guilty. I was satisfied that all the six accused persons understood the nature and consequences of the alternative charge. E F

FACTS OF THE CASE

[5] The facts of the case as outlined by the learned deputy public prosecutor show that on 15 October 2002 at about 8pm while Murugan a/l Latchumanan ('the second accused') was working at a sand processing site in Bukit Kuda, Klang, one Puspanathan a/l Kumaran ('the victim') came to see him on the site. Sinniah a/l Letchumanan ('first accused' and Raja Solan a/l Viveganandan ('third accused') were present at the site. G H

[6] The victim demanded a sum of RM300 (Ringgit Malaysia Three Hundred) from the second accused, threatening that if he did not pay out this sum, the victim would make a police report detailing the activities of the first, second, third and fifth accused as well as one Sathasivam a/l Rajalingam in stealing scrap metal on 5 October 2002. The victim maintained that he and two others had witnessed the theft. I

[7] The second accused immediately called Telagaran a/l Kupusamy ('the sixth accused') for help. The sixth accused arrived at the site shortly

thereafter with three others in two vehicles. The sixth accused and his three friends immediately set upon the victim and started beating him up. The victim was then tied up. The sixth accused then asked one of his friends to call up Kalimuthu a/l Krishnan ('the fourth accused') to come over immediately. The fourth accused duly arrived. The sixth accused then told the first, second, third, fourth and fifth accused persons to beat and hit the victim who was still tied up.

[8] The first, second, third and fifth accused beat the victim with their bare hands repeatedly, while the fourth accused used a long stick to strike the victim on his limbs. The sixth accused watched while the victim was being beaten, occasionally joining in. The entire episode was witnessed by Sathasivam a/l Rajalingam who described the victim's body as being covered in blood.

[9] The victim begged to be untied, but the sixth accused refused to respond. Finally Sathasivam loosened the ties and carried the victim and placed him on a table. At about 11pm the sixth accused having appropriated the accused's wallet, called the accused's father using a handphone. The sixth accused instructed the victim's father to come and take his son, failing which the victim would die. The sixth accused then handed the handphone over to the victim who begged his father to help him.

[10] The victim then asked Sathasivam for a glass of water and after he had drunk some water, asked Sathasivam to save him. While doing so, the victim fell from the table and lost consciousness. Sathasivam tried to revive the deceased but there was no response. The sixth accused examined the victim to ascertain whether he was breathing and concluded that the victim was dead. All the six accused persons then carried the victim and threw him into a river. The victim however, was not in fact dead when he was thrown into the river. The victim therefore drowned.

[11] On 17 October at about 3pm the victim's corpse was found by a member of the public. A post-mortem carried out the following day confirmed that the victim had suffered serious bodily injury from being beaten all over his body and had died as a consequence of drowning.

[12] These facts were read out to the accused in Tamil and explained to each of them. Each of the accused indicated directly to the court that they understood and admitted the entirety of the statement of facts as set out in exh P-6. On these facts the six accused persons pleaded guilty in full comprehension of the consequences of their pleas. I was satisfied from the facts, exhibits that were produced during the course of the trial and a consideration of the evidence as a whole that an offence under s 304 limb (b)

read together with s 34 of the PC had been committed. I therefore accepted the six accused persons' pleas of guilt. Each of them was then convicted and their pleas in mitigation heard and deliberated upon.

PLEAS IN MITIGATION

[13] Pleas in mitigation were made on behalf of each of the accused persons.

Sixth accused

[14] Puan Sri Saraswathy Devi put forward a lengthy and comprehensive plea in favour of the sixth accused, who was twenty two at the time of commission of the offence and is now aged 28. The most relevant portions of the plea in mitigation were that the sixth accused is a first offender and has put forward a plea of guilt, thus saving valuable judicial time and costs. Additionally learned counsel also set out the accused's version of events, which was adopted by all the other accused persons in this case. Essentially the facts were similar to that outlined in the statement of facts above, save that the basis for the dispute over the scrap metal differed. The accused sought to explain that the victim had in fact, with the assistance of his 'gang' attacked them first. These further facts sought to be adduced by the accused persons to explain their behaviour however, do not in any manner excuse the brutal and violent attack perpetrated on the victim by way of retaliation.

First accused

[15] The first accused was eighteen years old at the time of the commission of the offence and is now aged 24 having expended five and a half years in custody. He is one of five siblings and has no parents. He worked in a gas factory delivering gas prior to his arrest. He is a first offender.

Second accused

[16] The second accused was aged 24 at the time of commission of the offence and is now 31. He too has no parents and used to live with his sister in Klang. He used to work as a contract labourer prior to his arrest, earning RM600 a month. He too is a first offender. Counsel for the second accused maintained that the second accused's role was only to beat the victim with his hands and help to dispose of the victim thinking that he was a corpse. To that extent she sought a lenient sentence and also asked that no fine be imposed as the second accused would have no means of meeting such a penalty.

Third accused

[17] The third accused was 21 years old at the time of commission of the offence and is now 27. Prior to his arrest he lived with his parents and worked as a car wash attendant earning RM800 a month a substantial portion of which he donated to his family. He is a first offender.

Fourth accused

[18] The fourth accused was aged 35 at the time of his arrest. He had worked as a mechanic earning RM1,500 a month. He is married and has two children aged seven and nine. He was educated up to primary school level. Additionally it was pointed out that he is the eldest in a family of nine where three of his other siblings have passed away and one has committed suicide. He is a first offender.

Fifth accused

[19] The fifth accused was 23 at the time of the commission of the offence. He too has a primary school education. He worked as a contractor on a daily basis earning about RM600–RM700 a month prior to his arrest.

[20] All the accused persons expressed their remorse and repentance and sought the forgiveness of the deceased's family.

PROSECUTION'S SUBMISSIONS

[21] The learned deputy public prosecutor submitted to the contrary. He argued that the violence inflicted by the six accused coupled with their act in throwing the victim into the river should be viewed as one continuing act, resulting in the death of the victim. In short, that the six accused were directly and jointly responsible for the drowning of the victim. Therefore he submitted that the court should disregard its practice of affording the accused persons any credit for the plea of guilt, and urged the court, in the public interest, to impose the maximum possible sentence.

THE LAW

Sentencing principles and guidelines

[22] Section 304 limb (b) of the PC prescribes the statutory ambit for punishment for culpable homicide not amounting to murder '... *if the act is done with the knowledge that it is likely to cause death, but without any intention*

to cause death, or to cause such bodily injury as is likely to cause death'. It provides for the punishment of imprisonment which may extend to ten years, or with fine, or both. In deciding on the sentence to be imposed on the accused persons here, the court is bound to exercise its discretion judicially, in accordance with established principles. As I have stated earlier in *Public Prosecutor v Tegoh bin Aling* '*... there are many different circumstances giving rise to this offence that falls within this definition. It is a generic name for a group of offences perpetrated under dissimilar conditions. As a consequence a punishment for such offences which are committed under widely differing circumstances, yet which fall within such a generic definition, are correspondingly varied. In R v Cascoe* [1970] 2 All ER 833 *Salmon LJ wrote as follows with regards to the offence of culpable homicide not amounting to murder as encapsulated in s 304 of the PC: 'As for sentence, manslaughter is, of course, a crime which varies very, very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale it may sometimes come very close to murder'*. The degree of culpability of the accused in offences of this nature will accordingly vary considerably with the circumstances giving rise to the commission of the offence. The instant case is one which, on the scale falls far nearer to murder than to inadvertence. I say this because all the six accused persons saw fit to severely beat the victim, each of them doing so with the common intention of brutally hurting him, possessing the knowledge that death was the likely result of the beating. As if such brutality was not sufficient, these accused persons then saw fit to throw the victim into the river. It is evident that the accused persons possessed the knowledge that death was the likely or possible result of their combined brutality and violence

(a) The victim was hit and beaten up not just once, but repeatedly, first by the sixth accused and his friends, followed by his being tied up and hit and beaten up again by the rest of the accused persons. There was no basis for six men to continuously hit a single unarmed man. The victim's threats though wrongful, did not require warrant such a cruel and sadistic response, given that the dispute ultimately turned on a wrongful demand for RM300.

(b) The sixth accused saw fit to call up the victim's father and instruct him to 'collect' his son failing which death would ensue; again the sixth accused and each of the other accused persons therefore comprehended and knew that their acts were likely to cause death;

(c) The final act of throwing the victim in the river, when he was not dead, even if the accused persons thought he was dead, lends further weight to the fact that they realised that their acts had caused the victim's death.

[23] Given these compelling facts the six accused are fortunate indeed, that an alternative charge was preferred against them. Nothing arose from the facts

set out during mitigation which served to exonerate the extreme acts of violence perpetrated by the accused persons.

[24] In deciding on the proper sentence to be imposed the court is bound to give considerable weight to public interest (see Hilbery J in *R v Kenneth John Ball* (1951) 35 Cr App R 164); *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256). As stated by Abdoolcader J (as His Lordship then was) in *Public Prosecutor v Teh Cheng* [1976] 2 MLJ 186:

> In sentencing generally the public interest must necessarily be one of the prime considerations... public interest should never be relegated to the background and must of necessity assume the foremost importance ...

[25] Offences under s 304 of the PC have not abated over time despite the imposition of deterrent sentences of punishment; in fact they have become commonplace, to the extent that the public do, on an almost daily basis voice their serious fears and concerns that crimes of such a serious nature be censured strictly. The courts must therefore continue to emphasise general deterrence in an effort to provide a greater measure of security for society. And this is done by imposing sentences that are proportionate to the nature of the crime committed. In this case, the culpability of the six accused persons' actions, and the extent of the violence and brutality that they perpetrated on the victim are the paramount factors to be considered in determining the appropriate range of sentence. As against this the relevant matters set out in their individual pleas of mitigation are to be taken into account.

[26] The pleas in mitigation put forward by individual counsel in favour of each of the six accused disclosed primarily two relevant issues, one being that each of them is a first offender and secondly that they have pleaded guilty to the alternative charge preferred against them.

First offender

[27] The fact that the six accused persons are first offenders is a mitigating factor although the extent to which it is so is drastically limited given the nature and gravity of their offence.

Plea of guilt

[28] The six accused persons pleaded guilty as soon as they could upon an alternative charge being afforded to them. It is an established principle that some discount in the sentence to be imposed should be accorded to an accused person who pleads guilt, the oft-repeated basis being that a

considerable amount of the court's time is saved in avoiding a lengthy and expensive trial, thus enabling other cases to be disposed of more expeditiously. It also saves victims and witnesses from the concern of having to give evidence at trial.

[29] In *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, it was held that a plea of guilt entitled the accused to a discount of one-third to one-quarter of the sentence. In *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45 Visu Sinnadurai J pointed out that the credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law, but on the sentence that is likely to have been passed if the accused had claimed trial and been found guilty. A failure on the part of a judge to grant credit or discount may be construed as the judge not exercising his discretion in sentencing judicially (see *Soosainathan v Public Prosecutor* [2001] 2 MLJ 377).

[30] As against this, the courts have also recognised that it is not in every case that a discount or mitigation is entitled as of right. Where the offence is extremely grave, the courts have determined that public interest outweighs the plea of guilt as a mitigating factor, in which instance it will not be taken into account. In *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 901 for example the quantity of drugs was so large that this was considered a sufficient menace to warrant public interest prevailing over the plea of guilt of the accused. Accordingly, the court imposed the maximum term of imprisonment and the Court of Appeal upheld this decision.

[31] The facts of the instant case as stated earlier are indeed extremely grave given the degree of brutality and violence occasioned upon the victim. Accordingly in exercising my discretion I concluded that a discount, if at all afforded, should be nominal, in proportion to the gravity of the offence perpetrated by each of them. This is not therefore a case where a discount of one-third or even one-quarter is appropriate. The discount will be considerably less.

NO DISPARITY IN SENTENCE TO HE IMPOSED ON EACH OF THE ACCUSED PERSONS

[32] As all of the six accused have pleaded guilty for the same offence which was committed jointly, and as the facts of the case do not warrant the conclusion that any one of the accused should be accorded considerably greater blame or culpability for the offence than the others, the sentence to be imposed should be uniform.

A COMPARISON OF SENTENCES IN OTHER CASES FOR A SIMILAR OFFENCE

[33] A review of case-law for sentences imposed in other cases shows a range of between seven and ten years (see *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; *Public Prosecutor v Tan Chee Seng & Ors* [2004] 1 MLJ 392). However as I stated at the outset the case-law reveals a broad range of sentencing reflecting the varied circumstances as well as the varying degrees of violence inflicted in each particular case falling within this genre of offences under s 304 of the PC. In the instant case, if the matter had proceeded to completion and a finding of guilt made, it is likely that I would have imposed the maximum sentence available under the section, given the violence and brutality that was present. Taking into consideration the relevant factors outlined above, the appropriate sentence to be passed on each of the six accused persons in this case is a term of imprisonment of nine years which is to take effect from the dates of their individual arrest.

All accused sentenced to nine years imprisonment from date of individual arrest

Reported by Augustine Soosay